

THE
ARGUMENTS
OF THE
RIGHT HONOURABLE
THE
EARL of DANBY
The Second Time,
At the COURT of
KING'S-BENCH
AT
WESTMINSTER,
Upon his Lordship's Motion for BAIL,
The 29th. day of *June*, Term. *Trin.* 1682.
As they were then Exactly taken.

L O N D O N,

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Earl of Danby's ARGUMENTS

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K I N G ' S - B E N C H ,
Upon his Lordships Motion for BAIL,
The 29th Day of June, Term. Trin. 1682, &c.

The Right Honourable the Earl of Danby, appearing in the Court of Kings-Bench, the 29th Day of June, upon his Writ of Habeas Corpus; the Return of the Writ was read by the Clerk of the Crown, and then his Lordships Council Moved the Court, That the Return might be Filed, and his Lordship might be Enlarged from his Imprisonment upon Bail, his Lordship having very good and sufficient Bail ready in Court; and thereupon the Earl applying himself to the Lord Chief-Justice, spoke to this Effect,

Earl of Danby, My Lord, When I last attended your Lordships, and this Court, the Judges (or most of them) were of opinion, That what I then said to your Lordship might deserve further Consideration; and therefore my Lord, I doubt not, but that your Lordship has been pleased to consider further thereof.

At that time, my Lord, none of the Judges but your Lordship, I think, made any very particular Objections against my being Bailed; and if I am able to offer any thing to your Lordship that may give a sufficient Answer to those Objections, I do not doubt but that your Lordship is so just, that you will not adhere to any Opinion, only because you have been once of that Opinion, if any thing can be shewed to convince you to change it. In confidence therefore, that I am before a Court which is not to be Influenced by any Body (*how great soever,*) nor by any thing but by the Laws of *England*, and by your Oaths to do Justice according to those Laws; and being well assured of the

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Care which your Lordship will always have to maintain the *English Liberties*, with which your Lordship is Intrusted by the King, and by the Laws, and Invested with Power enough by both to defend them at all times, and against all Opinions whatsoever. My Lord, I say, presuming, and not doubting of all this, I shall take upon me to add something to what I have said already to the Objections which were then made by your Lordship, and I hope I shall have liberty to Answer any new Objections that may be now made.

My Lord, I take it for granted in the first place, That the Order of the House of Lords is no Objection against my Bail, because your Lordship was pleased to tell me so the last time I was here; and then I do reckon that those Objections which have been made against my being Bailed, may be summed up under these Three Heads.

The First, My Lord, as well as my memory will serve me, was, That as it was Incongruous for a Court which was Inferiour to this, to Bail any Man that was Committed by this Court, or to call in question the Process of this Court; so it would likewise be for this Court to do in my Case; for that if a Man were Committed by this Court, no Inferior Court could Bail that Man, (in Case His Majesty should think fit to Adjourn this Court from time to time) until this Court should sit again.

The Second Objection was, That I am not Indefinitely Imprisoned, for that when His Majesty shall please to call a Parliament, I would have Remedy; and therefore I must wait till His Majesty should please to call a Parliament.

The Third was, That this Cause of mine was depending in a Superior Court, which was too big for this Court, and that the Supreme Court having laid its hands upon me, therefore this Court could not Intermeddle in that matter; my Lord, these to the best of my Remembrance, are the Substance of the Objections then made.

The first of these, I have been told without doors, is taken to be one of the weightiest Objections against me, and truly I should be very glad it should prove so, because I think it may be so easily Answered.

For in the first place, As to the calling in question the Process, I conceive that Bail is no calling in question any Process, and this Court did surely think so, when in the Case of the Earl of *Shaftsbury*, they did declare, That had he not come to them in the time of an Adjournment of Parliament, they would have Bailed him; and my Lord, as nothing is more evident, then that this Court and other Courts do meddle with the Proceedings of that Superior Court, so I do not doubt but to make appear, that they do meddle in a much greater degree then what I desire of Bail; and that the Consequences of what they do, every Day practice, may be far more dangerous to the Subject, then the Bailing of me can be.

For that part of the Objection that compares a Commitment of this Court, to a Commitment of the House of Lords, and doth from thence conclude, that because an Inferiour Court to this cannot Bail a Man who is Committed by this Court, therefore this Court cannot Bail a Man who is Committed by a Superior Court.

This seems so very unequal a Comparison, and the inequality of it so obvious, that truly I thought it had not needed any Answer; for I would desire no other Answer from your Lordship, (if you can give it me,) then what an Inferior Court may give to any Person that shall come before them with the like Request: For they may give him good and sufficient Reasons why they do not Bail him; they may not only tell the Party that he is Committed by the Superior Court of the *Kings-Bench*, and that he must go thither for his Relief; but they can give him good Reasons why he must do so; for they can tell him that the Court of *Kings-Bench* will sit next *Term*, they can tell him when that *Term* will begin, and they can tell him how long that *Term* will last, and they can tell him that the Court of *Kings-Bench* cannot be Dissolved as the Parliament may be: And my Lord, this takes away all that Prisoners pretences, to say that he is an Indefinite Prisoner, and if your Lordship can give me any such Answers as these, I shall be as well satisfied as that Man ought to be; but if no such certain Answers as these can be given me, then I must beg Pardon, to tell your Lordships, that it cannot be denied, but that my Imprisonment is Indefinite, and if it be so, I do as an *English* Man affirm, that no Law in *England* can support it.

For the saying that if the King should Adjourn this Court from time to time, the Party could not be Bailed till such time as this Court should sit again; My Lord, If this should be admitted as a reasonable supposition (which under favour, I do not think your Lordship your self does take it to be) yet it is but an Adjournment that is objected, and if the Parliament were but under an Adjournment, I would not have troubled your Lordship: But this is not the Case, for though sometimes the King may Adjourn this or any other Court of *Westminster*, by reason of some extraordinary occasion, as in Case of a Pestilence or something of that nature, (and I know there have been Presidents of it) yet my Lord, these are upon Extraordinary occasions, and it is not to be thought, nay I am very certain, that his Majesty will never do any thing that shall deprive his Subjects of any of those Rights the Law allows them; So that in one Case the Law obliges that the Termes should be kept four times a Year, and that then the Court shall sit if there be not extraordinary occasions to hinder it; But in the other Case of a Parliament, the King lies under no obligation, nor restraint, when he shall call or whether he will call it; and therefore the Inequality of the comparison is sufficiently apparent: And besides this, It is as unknown how long a Parliament shall sit, as when it is to sit; Inasmuch that I take all this, But to have offered additional Arguments on my side & shews how little the Arguments are that can be brought against me; & I think it makes out to me and to all English men, that no man ought

to lye under such an Indefinite restraint as I do : and truly my Lord, I thought I shewed more respect to the Court, in giving a more General answer to this Objection (as I did before) then I can do now by being so particular.

For the second Objection, *viz.* That I am not Indefinitely imprisoned, for that when the King will please to call a Parliament, I would have a remedy there, and therefore I must wait till the King will call a Parliament.

Truly my Lord, perhaps your Lordship may know the mind of the King or his Ministers better than I do ; But if you do not, I am sure no man but the King can tell whether I shall have remedy then or no ; for by the experience of three Parliaments that have been called since I was a Prisoner, it hath appeared that I have had no Remedy : Therefore I should be very glad to see this matter any better proved, then it hath been that I am not Indefinitely Imprisoned ; but if this cannot be proved neither, but that I must wait till the King shall please to call a Parliament ; and when he shall call a Parliament, I shall be no more certain of my Remedy, than hitherto I have been, truly then I shall need no other Council but your Lordship to prove, I am under an Indefinite Imprisonment ; and that any man in *England* may be so when the King pleases ; and how any Doctrine can be more Arbitrary then that, or less to be defended by Law, when ever that matter shall be brought into question ; Others then either your Lordship or I must be Judges, and those who will be parties so much concerned in this question for their own sakes, as well as the publick, that I believe there is small doubt to be made how they will then decide this question.

My Lord, If it should then be found that this would hold water, and should be maintained for good Doctrine ; truly I think there would need no other Arbitrary power to be set up to make men quit this Country ; For as to any mans Liberty, it might be equal to him whether he lived under the French Government, or under the Grand Signiors Government, as under a Government so Arbitrary as this Doctrine alone would make ours ; And therefore I make no doubt my Lord, but that you will be very careful how you give it us for Law.

As I should be very sorry that there should be any such Arbitrary Doctrine taught to set the Kings Prerogative higher or greater than it ought to be by Law, or then this King desires, so I should be as sorry that the King should not have that right which duly belongs to him, which is a Right and Power at all times to administer Justice to his Subjects, and which I never heard denied to the Kings of *England*, nor I hope I never shall : And my Lord I must say that the preservation of that Right to the King, would take away all pretences for any of these dangerous and new Doctrines, for if the King may administer Justice at all times to his Subjects, (as it hath been the care of Parliaments, and by *Magna Charta* it self that he should) there is no reason left for any of those things to be started or put upon us.

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'Tis true indeed, that the King cannot make Laws without a Parliament, but I did never hear in my whole Life, but that he could administer Justice without his Parliament; and if he could not, his Subjects would be in a miserable Condition; for surely it would be a very hard Case, if his Subjects could have no hopes of being righted by their Sovereigns Authority, either by himself, or in his Courts, in all Cases, and at all times.

The House of Peers in Parliament ('tis true) is his greatest Court, but they Sit only by Vertue of the King's Writ, and if the King should dye (which I hope I shall never live to see) they would not then be a Court of Justice, nor any Court at all; and therefore, my Lord, in this Question, the Royal Authority, and the Subjects Liberties are so involved, that what Judgment soever shall be given, must pass upon the one, as well as upon the other, and cannot possibly be divided.

The third Objection that was made, is, That this Cause of mine is depending in Parliament, which is a Superior Court to this; and that the Supream Court having laid its hands upon me, therefore this Court cannot intermeddle.

My Lord, There is no man living, that hath a greater Reverence for that Supreme Court, than I have, or that will go further than I will, to defend it, in all the Rights and Priviledges that belong to it by Law; Nay, my Lord, I have so much a greater Esteem for that Court, because I am sure it will neither suffer me, nor any man living, to go unpunish'd, that shall transgress the Law, or that shall go about any way to make them Transgressors of the Law, or to make them such as would be restrainers of the *English* Liberties, beyond what the Law permits. They have shewed the contrary, when it was offered to them by a Bill from the House of Commons, that they would have no such absolute Authority put into their hands over the Liberties of the Subject, but did then refuse it; so that to say, that Supreme Court hath laid its hands upon any mans Liberty in *England*, further than the Law permits, would be to put an unjust Odium upon the House of Lords to the Nation, instead of doing them right; and therefore I must needs say, that in this particular Case of my own, I find only the word and name of Superior Court to be made use of against me, but nothing in reality; just as they were pleas'd in the House of Commons to use the word Traiterously, in the Articles against me, when there was not a tittle of Treason in them, only that by calling it Treason, it might serve to lay me where I am.

But, my Lord, I know no Court that is superior at this time to this Court where I am now, and how any thing can be said to be depending in a Court that hath no Being, I think will not very easily be defended from nonsense, without having the Matter extreamly well explained; and whenever that Superior Court shall have a Being, my Cause will then be before it, by my being Bailed to appear there. And for saying, it has laid its hand upon this Case of mine, it ought to be shewn in what
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the Superior Court hath laid its hand upon me, so as to keep me from Bail, when neither that Superior Court it self (though it were willing so to do) is able to give me any Relief, nor that I can get to be Tried or Discharged elsewhere, nor have any time prefixed when that Superior Court shall Sit; as if there were no Justice left in *England*.

But if it be so, that I shall neither be Bailed, nor have it shewed, what hand the Superior Court has laid upon me to hinder it, then truly any man may be so concluded, and the Argument may be decided, by the will and pleasure of those who have men in their Power; but the shadows of things, when there is no substance in the Argument, will not satisfy reasonable men for an Answer, why so publick a Grievance shall not be remedied; and I am confident, that the Superior Court it self, will never suffer its Name to be made use of, nor themselves to be made Properties, to support such a Grievance as may concern not only themselves, but the whole Nation, both in this Age, and to all our Posterities; and by which not only *Magna Charta*, and the Petition of Right, would be evaded, but the late Act of *Habeas Corpus* may also be eluded by this device; and the Parliament (when it shall meet again) will find, that instead of securing their Liberties, they have only been hedging in the Cuckow; for that there is now a new way found out, by which all Acts for our Liberties may be made of no effect: And this cannot be contradicted, unless (as some would fancy) the King could not Impeach as well as the Commons; but there are so many Evidences to the contrary of that, as there is no room left for the Dispute: And amongst the Presidents of that kind, there is one (because it hath a double Consequence) that I do desire to put your Lordship in mind of.

It is in the 5^o. *H. 4th*. in the Records of the Tower. There you will find, that the Commons came to Petition the King, that his Majesty would be pleased, not to Impeach the Arch-Bishop of *Canterbury*, the Earl of *Northumberland*, and some others, that were at that time accused for being in the Confederacy of Sir *Henry Percy*, and the King grants their Request, and does agree he would not Impeach them.

I have quoted this the rather, because of the double President that is in this Case; for again the same day the Commons came (after his Majesty had granted their former request) and did further Petition his Majesty, that he would be pleased to affirm those Lords (whom he had promised he would not Impeach) to be his true Liege-men; and the King did grant that also, by which it was then taken for granted, that he had set them *Recti in Curia*, (even though they were in that Conspiracy with Sir *Henry Percy*) and, my Lord, I give you this Instance, that you may observe two things by it: First, That the Commons did Petition the King not to Impeach; and when he had granted that, it appears also, that by the

the King's declaring them to be his true Liege-men, it was by the Commons conceived, that the King did set them *Recti in Curia*; by which it does appear, what great regard the House of Commons had to the King's bare Affirmation, of men being his true Liege-men; and I hope, that neither this King's Power nor Credit shall be less with his own Court, than that King's was with his House of Commons; and I am sure, no King's Affirmation can be greater, nor more publick, both to his Parliament and Kingdom, of any mans being a true Liege-man, (to use that old word) than the King's hath been concerning me.

My Lord, there are some men, very unable to distinguish (though they would) between sound and good sense, and there are a great many, that are as willing to let men remain under their mistakes; but since it weighs a great deal with some who do not very rightly distinguish, it will be of absolute necessity for me to explain what it is, that is meant by a Case depending in Parliament, when there is no Parliament: This will be best shewn by an Instance in a Writ of Error depending in Parliament, in which Case, when the Parliament is Sitting, and so the Writ is really and truly depending in the Court that is in Being; there can (during such Sitting) be no Execution sued upon the Judgment. But, my Lord, no sooner is the Parliament dissolved, but experience shews, that Execution may be sued, and Goods levied, and the properties of mens Estates changed; and therefore it is by this sufficiently plain, that depending is not then meant in the same sense, or in the same manner, as it was meant when the Parliament was actually Sitting; for then there could have been no Execution sued.

Now, my Lord, When a Parliament shall meet again, what does it meet with? It meets, it is true, with the same Cause again, (as to the Merits) but it meets it quite altered as to other Circumstances, *viz.* as to the Execution that hath been granted by an inferior Court, in the interval of Parliament. And as to the change of property, for a man's Estate, (and perhaps of great value) may happen to be in another mans hands at the same time by the Execution; so that when a Parliament doth meet again, it doth meet, it is true, with the same Cause (as to the Merits) but indeed as to nothing else.

And therefore, by this, it is clear, that a Parliament does only expect when it meets again, to meet with the Cause in the same state (as to the Merits of the Cause) and doth not at all meddle or concern it self to find fault with those suppletory Acts that have been done by an inferior Court in the interval, which was only to prevent failure of Justice, but it commends them for not having delayed Justice, and that men should not be kept too long out of their Rights, (even though there may have been prodigious Wrong done to the Parties, if the Judgment have been erroneous) for that the Superior Court will at last see to the Error, if any have been committed by the Judgment of the inferior Court, and will enter upon all as entire again (as to its Merits) as if nothing had been done by the inferior Court; so that in reality, that which can only reconcile the sense of being depending

pending in Parliament, when the Parliament is dissolved, is this last Order of the House of Lords, which declares Impeachments, &c. to be continued, notwithstanding Dissolution. For by virtue of this last Order, the Lords do proceed upon the Cause, without beginning *De novo*, or having any new Writ or new Impeachment brought up to them: But this is new Doctrine, and never practised till of late; however, since they have done so, in this sence, and in this only, a Cause may be said to be depending; and so it was adjudged, in that single instance of the Tryal and Condemnation of my Lord *Stafford*, but there they proceeded to the Merits of the Cause, and they tried, condemned, my Lord *Stafford*; and there is no manner of doubt, but by virtue of their late Order, they may proceed upon me when they shall meet, as they shall think fit, notwithstanding my having been bailed; for I desire not to have the Merits of my Cause removed from before the Lords, if I might, but that they may do with me as they please, even to Condemnation, if they shall have Cause, which I hope in God they never shall.

Therefore, I say, my Lord, in this sence only which I have explained, a Cause may be said to be depending, though a Parliament is not in being; but I will challenge the ablest Lawyer, with all the Sophistry he can use, together with his Law, to shew me how he can possibly distinguish the Case of Writs of Error, from the Case of Impeachment, or wherein they differ, as to their depending, in the Intervals of Parliament; and I likewise challenge him to make appear, how Bail is any other than such a suppletory Act, to relieve a man from being kept too long from his Liberty, as the granting of Execution in the Interval, is to relieve a man from being too long kept out of his Money or Estate, for that the Merits of the Cause both in the one Case and the other, remains entire for the Parliament to recommit upon (if they see cause) as well as to reverse the Judgment, and all the Proceedings, upon the Writ of Error.

Where is then the difference, my Lord? if there be any difference, I think it lies only in this, that in one Case there may be an erroneous Judgment, and a man may be almost undone and ruined, by being wrongfully dispossessed of his Estate (be it never so great) but in this Case, the suppletory Act which is done to admit to bail, can only be to ease a man from his too long or perhaps perpetual imprisonment, and can hurt no body, nor take no mans liberty from him, to grant him his; but yet this must be thought an hard Case, and the other a very easie one, and fit to be practised every day.

My Lord, if the Law has taken care, and made such provision, that a man shall not be kept too long out of 10 *l.* in money, or out of 40. *l.* a year in Land, then it would be strange, that the Law should not have made provision, that a man should not be kept too long out of his Liberty, and when there is no prospect of his having it.

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Besides, in a Writ of Errour the Judgment given is controverted, and the power of awarding Execution is suspended upon that very accompt, because the Judgment of the Court is in question, and the Justice of it is brought in dispute, whether they have judged right or wrong.

Now, My Lord, if the dissolution of a Parliament can restore the Judges power in the interval of Parliament, so as to award an Execution upon a Man's Estate, where the property shall be changed and altered, and notwithstanding their Justice was brought in question, and that they may have done great wrong to the Party by their judgment, and yet we are to believe, that the same Dissolution cannot restore the power of the Judges so as to give a Man a little Ease from a Confinement within four Walls, where the Justice of no Court is questioned nor arraigned, nor no wrong can have been done to any body; But on the contrary, does right to the King, who by his consent shews his Will to have a Man bailed; and great right to the Subject, who ought to be delivered from the danger of an indefinite Imprisonment which is so contrary to Law: Then indeed there must be some Infallibility supposed in that Chair, which shall maintain such Doctrine, and must be submitted to, with the same Implicite Faith, which they do who can believe Infallibility.

But for my part (who can believe Infallibly in no kind upon Earth) I confess I must have my Reason better satisfied, before I can any more believe this Exposition of the Law, than I can believe those infallible Mens Expositions of the Gospel.

My Lord, I hope I have made plain to your Lordship, what it is that is meant, or can be understood by a Cause depending in Parliament when there is none, and how and in what sense onely it can be understood to be so depending; and it is as plain, that the bailing of me is no intermeddling with the merits of the Cause in Parliament, but on the contrary, an evident affirmation of the jurisdiction of that supreme Court; and if I cannot be admitted to bail in some other Court than the House of Lords, it is contrary to what my Warrant of Commitment implies, by which I am committed onely till I am discharged by due course of Law, for which I am properly in this place.

My Lord, it cannot be meant that Bail can be any more than a Suppletory Act (*propter rei necessitatem*) and for the ease of the Subject, and it is impossible for that old Rule, of *Salus populi Suprema Lex esto*, to be more aptly applied in any case in the World than in this, that concerns every Man in England in his Liberty: For should it be otherwise, Pray see what the consequence of this Doctrine would be, that because a superiour Court which is not now in being (nor hath it in its own power to be so) hath committed a Man, therefore he cannot be admitted to Bail; what should become of Men, if after the dissolution of a Parliament, there can be no possibility of having justice done them?

Nay farther, if it should be granted that this Court cannot intermeddle, because the Superiour Court has committed, by that Doctrine it would not matter whether the Commitment were for Treason, or for the smallest quarrel or misdemeanor, for which a Man might happen to be in Prison at the time of a dissolution of a Parliament; nor would it be any matter, whether the Order of the House of Lords were revoked or not.

For it is an Order of a Superiour Court, which will still be a Superiour Court though the Order were burnt, and yet that must be enough to keep one in Prison by this Rule, for that there would still be no other remedy though the Order were repealed.

But, My Lord, the Warrant of Commitment shews the Lords Directions to be contrary to this Opinion, for I can shew several Instances of Warrants which run, some to be kept *till further order of that House*, others to be kept *till they shall be discharged by the House*, and others to be kept *till the pleasure of the House be further signified*, and others *during the pleasure of that House*; But my Warrant is, *till I am discharged by due course of Law*: Now I doubt not, but if the Lords had thought those words had not given a latitude for relief elsewhere, they would have worded the Warrant otherwise, and instead of saying *by due course of Law*, would have said, *till I were discharged by that House*, if the Lords had thought there had been no other remedy by Law, but by that House. But, My Lord, the Lords will not act any thing above the Law, they will keep every thing within the compass of the Law; and I am sure that there cannot be a better Example to follow, than the Example of those wise and great Men of that great Court, and I desire it may be followed and not contradicted.

For by this Doctrine, truly, My Lord, Liberty it self would not only be utterly lost; but to make the Riddle the greater, and the manner more ridiculous, it would be lost, and yet no body invade it: For the King he consents to my Bail (if he hath any power) so he does not intend to deprive me of my Liberty; The Lords would for their own sakes and Justice sake (if it were in their power to meet, and have time to sit so long as to take the Case of a single Person into consideration) do me justice, either in discharging or trying me; So that in my Case, here is a Subject of *England* imprisoned by no body, and yet no Power upon Earth can relieve me; Shew me an example of this in any Nation under the Sun, but this, that there wants a power in the Government to relieve a Prisoner at all times (if it would) and I will be satisfied; Nay, My Lord, the very *Spanish Inquisition* is more reasonable than this, for though the Cause may be unjust that they commit a Man for, and their usage of him may be very severe while he is there, yet the *Inquisitors* (if they please) can deliver him; there is no Prisoner in the World but can be delivered by some power or other, but me; and, My Lord, this is a Rule that must be for every Man in *England* as well as me, and I am not so inconsiderable but that my fate may be made a President of note.

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The Opinions, My Lord, that were given by the Judges in the Case of Ship-money, appear far more tolerable in my Opinion than this ; for I know there is no Man but had rather have a Sentence pass't against his Estate (which he may recover again) than have it passed against his Liberty, which he may never have, and which is more valuable than any Estate.

Besides, where is the Justice of the Nation? and what a shame would it be to our Laws and to our Government ; that it could be said of this Countrey, that a Man might be punished by Imprisonment in *England* (where the Government is not Arbitrary) for seven Years or more, and at last be found guilty of no Offence? and what satisfaction could be in nature given to that Man? I say if that Man could have a Crown given him, it could not make him satisfaction for the loss of his Liberty all his life, which may be the Consequence of this Doctrine ; and, my Lord, there are Precedents good store where Men have suffered sufficiently for their Judgments against the *Liberty and Property of the Subject*, but I never found one that suffered in the Defence either of the one or the other.

I have shewn I think sufficiently what can be meant either in my Case or any other, by a Cause depending in *Parliament*, when there is no *Parliament*, as also how much Inferiour Courts do meddle with things of much an higher nature than Bail will be ; Insomuch that truly I should think it might be sufficient to say no more than I have said ; But I do not know what may be sufficient in my Case ; and therefore, my Lord, you must Pardon me, if I do put you in mind of a Case wherein you have gone to the merits of the Cause it self when Depending in *Parliament*.

It is *Fitz-Harris* his Case ; and I know very well what Answers will be given me ; as that *that* was a Case rejected by the Lords, and that it was not the same Treason for which he was Impeached, and other things that I could mention ; but I know your Lordship will speak by the Record of the Court (of which I have here a Copy) and the Record is that which must satisfy the World an hundred years hence, by which it will appear to them, that he was Impeached, and Tryed, and Condemned, depending that Impeachment ; for he made that his *Plea*, and Mr. Attorney General demurring to it, the Court must take the matter pleaded, as confessed and allow'd ; and this being so, I should think there should be no scruple made in the point of Bail, or if there should, there must certainly be very great hardship in one case or the other, and must be very difficult to be answered.

But to Conclude, besides all this, I am the King's Prisoner ; and I have the *King's* Pardon, and if I cannot get to be *Bailed*, there is not only a defect of Jurisdiction in this Court, but a defect of the Regal Authority and Power of the Kings of *England* to administer Justice

stice to their Subjects ; which was never heard of I think, and I hope I shall never live to hear of it (Especially from the *King's* Supreme Ordinary Court of Justice.) And that, My Lord, that must make this Case the more unhappy at this time is, that we live in days wherein his Majesty's Prerogatives are so much brought in question: For what Prerogative hath He which is more undoubted than his power of Pardoning ? and yet you see that brought in question to the utmost, and those that are the ablest Men that speak against that power, do laugh at the little small Triflers who object, that the *King* may Pardon before Impeachment, and after the Sentence be given, but not betwixt those times; They laugh at this, and tell you that he cannot Pardon at all, and it is easily perceived that if they could reach their design, they would have it understood, That *Treason* may be committed against the People, and by that Doctrine another High Court of Justice, may be set up, and the *King* may be tried by his People as well as he can try them; My Lord, there are a great many of Consequences attending upon that Doctrine, which I am sure will ne'er be countenanced by the *King's* Courts ; but I shall not wonder that such Men as these be trying their Projects, and think themselves in the Right to do so, If they find his Majesty cannot doe so much as a lesser Act of Grace for his Prisoner, which is but to give him ease from too long or perhaps a perpetual Imprisonment ; for if he hath not power so much as to Bail his own Prisoner, I shall not wonder if others question whether he hath power to Pardon him.

My Lord, I have seen such Keepers of our Liberties, from whom I should expect such Doctrines, but I thank God that by our Laws the *King* is the Keeper of our Liberties, and therefore I hope I shall not hear any such Doctrine by which he can only be the Keeper of us in Prisons, but shall have no more power than another Man, to set his Prisoner at liberty, although his Will be only to give his Prisoner Ease (as the Law intends) against Indefinite Imprisonment.

Lastly, My Lord, If I should die in Prison with this Pardon by me, which I have shew'd Your Lordship ; or suppose that the House of Commons (if it were but with a design to destroy the Pardon) would give some other reason than the Pardon (as being better satisfied concerning me, or any thing else) why they would prosecute me no more (of which there be divers Precedents). What a Wound would thereby be given to the *King's* Prerogative ? and pray how is it possible almost to give it a greater blow than this would be ?

What a Precedent would it be to Posterity to say, that a Man had lain Three, four or five years or more in Prison notwithstanding a Pardon, that signified nothing all that time ? for that the *King* would have Eased him if he could, and hath shewed his Court that he would do so, but was not able so much as to have him Bailed ? would not this put that Prerogative in great hazard ? I confess I do wonder that some others besides Your Lordship have not taken more care of the Prerogative of the *King*, for their own Sakes as well as the *King's* ; For it would

would be very convenient it should be usefull, if ever it should become necessary; And it is not improbable, but if the *King* should hereafter find such a Prerogative diminish'd, he would not only reflect upon his Loss, but upon those who might have advised better, or might have better defended this Prerogative of the *King*; And for the Subjects Liberties, there will never be Eyes wanting to inquire after any invasion which shall be made of that kind.

Upon the whole, I have troubled Your Lordship too long, but it hath been upon a Subject of the greatest Concern to *English-men*: I have such Bail to offer to Your Lordship, as I am sure cannot be denyed, and I am in my own Conscience sufficiently satisfied, that I am detain'd a Prisoner from Bail, neither by the *King*, by the Lords, nor by the Laws; and therefore, my Lord, I do humbly pray your Lordship you would please to accept my Bail, and as I here offer your Lordship my Pardon again, so I again pray the benefit of it, and I desire your Lordship it may be read in Court.

THE Lord Chief Justice then spoke, and so did all the rest of the Judges, (upon the Earls desiring that they would severally deliver their Opinions) And the Lord Chief Justice, and Mr. Justice *Dolbin*, did deliver their opinions, that the Earl could not be relieved by that Court. Mr. Justice *Jones* concluded his Discourse with saying, that he could not give his Judgment that the Earl should be Bailed AT THAT TIME. Mr. Justice *Raymond* did say, he could not see but that there would be a *failure of Justice* if so be his Lordship should not have Liberty upon Bail; but that he had not had time to view Precedents, and therefore it would be very unfit for him at present to be positive in what he did say.

And then the Lord Chief Justice did tell the Earl, he must be contented to be Remanded.

I Have not dared to set down the Particulars of what was spoken by the Judges, the Writer not having well heard what was said by some of them, but some are said to have taken Exact Notes, which may perhaps be Published hereafter by themselves: And it is likewise reported that the Earl (not having been permitted to reply in Court to the Reasons given by the Judges against his Lordship's being Bailed) does likewise intend to put forth his Answer to the Reasons which were then Objected against him.

F I N I S.